(3)

No. 06-128

In the Supreme Court of the United States

MARC C. HOUK, Warden,

Petitioner,

v.

MAXWELL D. WHITE, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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INTRODUCTION

The Sixth Circuit noted, but failed to apply, the "special deference" owed to state court juror-bias decisions. Instead of asking whether the record fairly supported the trial court's decision, the court below re-assessed credibility on its own.

White responds that the Sixth Circuit's deference is shown by the court's recitation of the right rule. White Opp. Br. ("Opp.") at 7. But every aspect of the panel's analysis, save two passing references to "deference," reads like de novo review. Perhaps recognizing that the Sixth Circuit failed to *actually defer*, White tries to prop up the result below by claiming that the Sixth Circuit properly treated the juror-bias question as a legal one. Opp. at 9. But that argument shows the need for review, as it conflicts with the Court's treatment of juror-bias questions as factual, not legal.

White also implies that the trial judge's decision does not warrant deference because he failed to (1) question juror Sheppard personally; and (2) explain his decision to keep juror Sheppard on the jury. Opp. at 14-17. But White cites no case holding that deference applies only if a judge personally inquires. Indeed, the Court has held that a trial judge's denial of a request to excuse a juror for cause is itself a sufficient finding of fact that needs no further explanation. *Wainwright v. Witt*, 469 U.S. 412, 430-31 (1985).

White neither embraces nor applies the fair-support-in-the-record standard. Instead, he omits two of juror Sheppard's responses that support the trial judge's decision and accuses the Warden of failing to discuss the record as a whole by omitting juror Sheppard's general voir dire. Opp. at 1, 10. But White includes only some of Sheppard's general voir dire comments, which the Sixth Circuit did not purport to rely upon anyway. White neglects a crucial affirmation of juror Sheppard's impartiality and, more importantly, trial counsel's confident withdrawal of a challenge to juror Sheppard during the general voir dire. We therefore welcome

inclusion of the general voir dire, which only adds support for the trial judge's decision to believe juror Sheppard.

A. The Sixth Circuit's mere mention of the "special deference" standard does not overcome the court's failure to actually defer to the state court's juror-bias finding.

As our petition detailed, federal courts give "special deference" to state court juror-bias findings by upholding them when the record contains "fair support" for the finding. *Marshall v. Lonberger*, 459 U.S. 422, 432 (1983). White did not, and could not, cite any part of the opinion below to show that the court looked for fair support. Instead, White insists that the Sixth Circuit met the standard by merely noting that state trial court juror-bias findings are entitled to special deference. Opp. at 7-8. But federal courts cannot insulate their decisions from review by paying lip-service to the AEDPA standards. *Rice v. Collins*, 126 S. Ct. 969, 973 (2006) ("Though it recited the proper standard of review, the panel majority improperly substituted its evaluation of the record for that of the state trial court."); *Price v. Vincent*, 538 U.S. 634, 639 (2004) (reversing the Sixth Circuit for reciting the AEDPA standard but then "proceed[ing] to evaluate respondent's claim *de novo* rather than through the lens of §2254(d)"). The lower court's *analysis* matters; its citation of the right test does not overcome its failure to follow that test.

White criticizes us for failing to discuss the Sixth Circuit's § 2254(d)(1) analysis, but the court's discussion of AEDPA deference is a vague afterthought: "Accordingly, we find that the trial judge's failure to excuse Sheppard and the Ohio Supreme Court's finding that the trial court did not abuse its discretion in failing to strike Sheppard were contrary to or an unreasonable application of Supreme Court precedent." App. 42a. The passage suggests the § 2254(d)(1) standard, but adds no analysis to rebut.

White's attempt to make up for the Sixth Circuit's deficiency is disingenuous. White partially quotes the Ohio Supreme Court's analysis, and he argues that the Ohio Supreme Court set the bar too low by requiring only a single affirmation of an ability to be impartial. Opp. at 11-12. He quotes the Ohio Supreme Court as concluding, "[s]ince the challenged juror *ultimately* said that she would follow the law and put aside her personal beliefs, we find that the trial court did not abuse its discretion in overruling appellant's challenge for cause." White neglects to note that he supplied the emphasis to the word "ultimately" in that quote. See App. 183a. White also neglects to provide a full quote, which reveals more than a simple requirement that a juror "ultimately" say she will follow the law and not her beliefs:

> In this case, the challenged juror expressed repeated concerns over whether she could be fair to the appellant. However, she ultimately acknowledged that she was a fair person and was willing to listen to all the evidence before making a final decision on appellant's guilt. She also stated that she would not let her personal feelings interfere with her ability to be fair to appellant because she would have to live with that the rest of her life. Furthermore, she said she would obey the law and the court's instructions. Since the challenged juror ultimately said that she would follow the law and put aside her personal beliefs, we find that the trial court did not abuse its discretion in overruling appellant's challenge for cause.

App. 183a-184a.

B. Federal habeas courts must treat state court juror-bias determinations as findings of fact, not law.

White's own defense of the decision below undercuts his assertion that the court properly deferred. Specifically, White mistakenly characterizes the juror-bias issue as a

question of law. Opp. at 9 ("Juror Bias Is a Question of Law"). White quotes *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003), in which the Court said that credibility determinations are assailable, and federal habeas courts can "conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." But *Miller-El* confirms that juror-bias decisions are factual, as the Court specified two ways in which factual findings can be overturned: (1) the decision was "unreasonable"; or (2) the factual premise found by the trial judge is overcome with "clear and convincing evidence." *Id.* The Court noted in the same paragraph that "unreasonable" and "clear and convincing evidence" refer to the two AEDPA standards of the same language, which concern factual findings. *Id.*

White fails to respond to our showing that juror-bias decisions are purely factual. See Pet. at 12; citing *Patton v. Yount*, 467 U.S. 1025, 1036, 1038 (1984), and *Wainwright v. Witt*, 469 U.S. at 428. We add *Miller v. Fenton*, 474 U.S. 104, 115 (1985) ("juror bias merits treatment as a 'factual issue' within the meaning of §2254(d) notwithstanding the intimate connection between such determinations and the constitutional guarantee of an impartial jury").

White later muddles the standard even more by claiming that the decision below will not create confusion because "[c]ircuit courts have clearly and routinely applied the same reasoning as the Sixth Circuit." Opp. at 12. White then cites two Third Circuit cases as "proof" that the Sixth Circuit applied a familiar AEDPA standard regularly applied by other courts. But those cases are not AEDPA cases; they are not even habeas corpus cases. They are instead cases on direct review. See *Gov't of the Virgin Islands v. Dowling*, 814 F.2d 134, 139-41 (3d Cir. 1987), *aff'd*, 493 U.S. 342 (1990) (lack of mid-trial voir dire regarding jury's consideration of non-record information); *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 155-56 (3d Cir. 1995) (civil case regarding juror's stated bias against asbestos companies).

C. White's proposed requirements for deference to a state court's juror-bias decision find no basis in law.

Instead of addressing our demonstration that the court should look for "fair" or "plausible" support for the trial court's decision, White invents several legal requirements for juror-bias decisions that serve only as artificial ways to distinguish some of the authority we cited in our Petition.

1. White discusses three cases from the Court for the proposition that trial courts should not believe statements of impartiality when they are brief and/or the product of leading questions. Opp. at 12-14. The Court did say that trial courts "may" consider such facts in sorting out contradictory statements: "The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading." *Patton*, 467 U.S. at 1039. But the Court imposed no mathematical weighing requirement. Indeed, the Court's analysis showed that even a single, slightly ambiguous statement could be the basis of an appropriate finding. *Id.* at 1039-40 ("we cannot fault the trial judge for crediting [a juror's] earliest testimony, in which she said that she could put her opinion aside '[if] [she] had to,' rather than the later testimony in which defense counsel persuaded her that logically she would need evidence to discard any opinion she might have.").

Nor do *Morgan v. Illinois*, 504 U.S. 719 (1992), and *Murphy v. Florida*, 421 U.S. 794 (1975), help White. Opp. at 13-14. Contrary to White's claim, *Morgan* said nothing about leading questions. Opp. at 13-14. The Court instead found that general questions about a juror's ability to be impartial are not enough to probe whether the juror would automatically vote for the death penalty. *Morgan*, 504 U.S. at 735. The voir dire here did not suffer from such a limited questioning, and juror Sheppard affirmed more than a general commitment to impartiality. She confirmed that she would require the State to prove that the death penalty should be

given, that she would not let her personal feelings override her duty to be a fair juror, and that she would consider all factors (including mitigating factors) before reaching a sentencing verdict. App. 205a, 212a-213a.

Murphy v. Florida, 421 U.S. at 801-02, a case regarding allegedly prejudicial pre-trial publicity, does contain a discussion about leading questions producing a statement of bias. But the Court emphasized that it was one loaded hypothetical scenario followed by leading questions that produced two weak statements ("I imagine" and "I think") that approached bias. Those two statements do not equal juror Sheppard's many affirmations that she would consider mitigating evidence and could be fair.

2. White insists that two other requirements are absent from the record, and he implies that their absence undermines the deference normally owed to trial court findings regarding juror bias. First, White criticizes the trial judge's failure to explain on the record why he allowed juror Sheppard to remain. Opp. at 7, 14-16. But the Court has expressly refused to require on-record explanations for juror-bias decisions:

> We decline to require the judge to write out in a separate memorandum his specific findings on each juror excused. A trial judge's job is difficult enough without senseless make-work. Nor do we think under the circumstances that the judge was required to announce for the record his conclusion that juror Colby was biased, or his reasoning. The finding is evident from the record.

Wainwright, 469 U.S. at 430-31; see also *Marshall*, 459 U.S. at 432-34 (no explanation required for credibility findings to be entitled to deference).

White nevertheless uses the lack of explanation here to distinguish *Rice*, 126 S. Ct. at 974, which did involve a trial judge's explanation for his credibility finding. But we relied

on *Rice* for the general point that federal habeas courts may not re-examine credibility when the record contains debatable inferences. Pet. at 23-24. More important, *Rice* involved a *Batson* claim, so a separate substantive rule requires the trial judge to assess the prosecutor's explanation by considering the evidence in support of it at a hearing. *Miller-El v. Cockrell (II)*, 545 U.S. 231, 251-52 (2005). No such requirement applies to juror-bias determinations.

Second, he argues that the trial judge here did not personally ask juror Sheppard any questions, and he claims that such a fact distinguishes this case from *Williams v. Bagley*, 380 F.3d 932 (6th Cir. 2004), one of five circuit court cases that we cited to show the need to defer to state trial court determinations fairly supported by the record. Opp. at 17. White cites no case for his conclusion that a judge's questions somehow enhance the juror-bias finding. And the *Williams* court did not rely on the judge's own questioning as the basis for deference. Thus, a lack of judge-questioning does not distinguish *Williams*.

White tries to distinguish another of our cited cases by contrasting the "think so's" and "I guess so's" that the Third Circuit evaluated in *Martini v. Hendricks*, 348 F.3d 360 (3d Cir. 2003). But White errs in equating juror Vladyka's equivocal *affirmative* responses with the entirety of juror Sheppard's answers. The relevant comparison is between the answers relied upon by the trial judge. In *Martini*, the judge excluded a juror whose stated ability to vote for a death sentence was expressed mostly with "think so's" and "guess so's." In contrast, juror Sheppard unambiguously expressed her ability to be impartial, to consider mitigation, and to follow the court's instructions.

D. The record fairly supports the trial judge's finding that juror Sheppard was not biased.

White mounts a scattered attack on the factual basis for the trial court's finding. He selectively quotes passages that

support his argument, omits juror Sheppard's responses that support the trial judge's decision, and accuses the Warden of failing to discuss the record as a whole by omitting juror Sheppard's general voir dire. Opp. at 1, 10.

1. White faults us for not including juror Sheppard's general voir dire. Opp. at 1, 10. But White does the same, as he includes only the favorable parts of the record. Moreover, we welcome the addition of juror Sheppard's *entire* general voir dire because it supports the trial judge's finding.

White purports to set out juror Sheppard's general voir dire, Opp. at 2-4, and finishes that recitation by including two partial quotes from juror Sheppard:

- "I still do have an opinion about this, and you will have to work hard to change that opinion." Opp. Apx. A-37;
- ". . . I am a fair person. And I am willing to listen to all the evidence and then make my final decision. But like I said earlier, I feel what I'm feeling now I'm going to hear up there." Opp. Apx. at A-38.

White omits the next two pages of dialogue between defense counsel and Sheppard. That dialogue included defense counsel asking juror Sheppard to consider a scenario in which she was the one on trial for aggravated murder: counsel asked whether she would want someone like herself on the jury. She replied, "Yes, I would, because I'm a very honest person." Opp. Apx. at A-38. After juror Sheppard later indicated that she would want justice done, defense counsel explained that everyone wanted justice, and he concluded his examination of Sheppard in this way:

> MR. ROBERT WHITNEY: . . . But he's entitled to a fair trial on those issues by people who have not formed an opinion or judgment as to what the ultimate decision should be, okay?
>
> THE JUROR: Right.

MR. ROBERT WHITNEY: And you're telling me whatever your opinion is right now as you sit here, you can look me in the eye and tell me that you can put that aside and decide this case based on evidence, not what your opinion is of what you feel right now?

THE JUROR: Yes.

MR. ROBERT WHITNEY: You can do that?

THE JUROR: Mm-hmm.

MR. ROBERT WHITNEY: I think you can too. Okay. Withdraw out challenge for cause on Mrs. Sheppard, judge.

Opp. Apx. at A-39.

2. White's selective quotation of the death qualification voir dire is no fairer. White claims that only three responses by Sheppard show commitment to impartiality, and White contends that leading questions elicited responses of "Yes, I would," "Right," and "Yes." Opp. at 7. The transcript contains at least five strong statements disavowing bias, and the two that White omitted strongly show impartiality:

PROSECUTOR FRANCESCONI-ROGERS:

Okay. And when you're saying to me that you think you could, it sounds to me as though you will not automatically vote for imposition of a death penalty; is that correct?

JUROR SHEPPARD: Yes. I guess I am trying to say *I am in favor it as long as it's proven that it should be given.*

App. at 205a (emphasis added).

PROSECUTOR DESANTO: Would you obey the law and the Court's instructions?

JUROR SHEPPARD: Yes, I would.

App. at 212a.

MR. ROBERT WHITNEY: My question is, Are your personal opinions as you sit here right now going to override, even though you agree to follow and listen to the Judge's instructions, "obey the law," quote-unquote, are your personal feelings, opinions, as you sit here right now going to override that to the point that you cannot be a fair juror in the trial of State vs. Maxwell D. White?

JUROR SHEPPARD: *No, I wouldn't let my personal feelings do that, because I would have to live with that the rest of my life.*

MR. ROBERT WHITNEY: Then you would be willing to consider all the factors, mitigating factors, aggravating factors, before deciding what penalty or punishment should be imposed in this particular case if you were a juror?

JUROR SHEPPARD: Right.

MR. ROBERT WHITNEY: You would listen to those with an open mind, unbiased by what you feel like you might want to do?

JUROR SHEPPARD: Yes.

App. at 212a-213a (emphasis added).

This fairly supports the trial court's finding. The Sixth Circuit's failure to even look for fair support led to its application of the wrong law and produced the wrong result.

CONCLUSION

For the above reasons, Ohio urges the Court to grant the State's petition and reverse the Sixth Circuit's decision.

Respectfully Submitted,

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